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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OMAR BECKETT et al., Defendants and Appellants.	B214182 (Los Angeles County Super. Ct. No. BA341911)

APPEAL from judgments of the Superior Court of Los Angeles County. Michael E. Pastor, Judge. Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and Appellant Omar Beckett.

Dennis L. Cava, under appointment by the Court of Appeal, for Defendant and Appellant Jason Edward Hodge.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Zee Rodriguez and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Omar Beckett (Beckett) and Jason Hodge (Hodge) (also "defendants") appeal from judgments of conviction after a jury found them guilty of assault by means likely to produce great bodily injury, with a true finding that defendants each inflicted great bodily injury upon the victim. The jury also found that the crime was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members. Defendants contend that the jury's gang finding was not supported by substantial evidence; that the prosecution committed misconduct in closing argument; and that the trial court gave an incomplete instruction regarding assault by two or more persons. In addition, Hodge contends that the trial court abused its discretion in denying his motion to dismiss a prior felony conviction. We reject defendants' contentions, and affirm the judgments.

BACKGROUND

1. The Charges

Defendants were charged with assault upon Marcus Jenkins (Jenkins) by means likely to produce great bodily injury, in violation of Penal Code section 245, subdivision (a)(1), a felony.[1] It was also alleged that each defendant personally inflicted great bodily injury upon the victim, within the meaning of section 12022.7 and that each defendant committed the offense for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)(1)(c)).

As to Hodge, a prior "strike" under the "Three Strikes" law, sections 667, subdivisions (b) through (i), and 1170, subdivisions (a) through (d) was alleged.

2. Trial Testimony

Jenkins testified that on June 2, 2008, he was at his late grandfather's house located on West 55th Street with his blue Ford Ranger truck with a camper shell, parked on the street next to the driveway. Jenkins was in the backyard when he saw Beckett

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

sitting on his truck and Hodge standing nearby. Two young women were sitting on the curb behind the truck, and Beckett was talking to them. When Jenkins "hollered out" to get off his truck, Beckett jumped off, made a peace sign with his fingers, and said, "I apologize. I didn't mean to be sitting on your truck like that."

Jenkins then heard Beckett say to Hodge, "Man, I know you didn't write on that man's truck like that." Jenkins became angry and shouted profanities as he came down the driveway toward the two men. Jenkins aggressively approached Hodge, and said, "I know, goddamn it, that you did not write no shit on my damn truck." Jenkins saw something written in the dust on the window, including the number "50" or "55" -- he was not sure. Jenkins could not remember what the message in the writing was, but remembered telling the police that it was gang graffiti -- "50's writing." Jenkins described his mood at seeing the writing as "a pretty hot rage." He wiped the figures off the window as he said, "I don't even get down with this. I don't know why you write on my property."

When Jenkins was about six feet away from Hodge, Hodge's expression changed to one of anger, and Jenkins worried that he might have come on "too strong." He therefore turned to the right, trying to turn his back to the truck and Hodge. Beckett had not behaved aggressively and Jenkins did not see him as a threat. Jenkins saw tattoos on Beckett's arms, but denied that he recognized them as gang tattoos.

The next thing Jenkins remembered was waking up in the hospital later, with cuts on his face and the inside of his mouth. He received four or six stitches on the outside of his face and about 10 stitches on the inside. He had an abrasion on his back from where he fell in the street, and still bore a scar from that injury. The facial cut left a scar one and one-half inch long. While Jenkins was in the hospital, two police officers questioned him and showed him photographs. Jenkins identified Hodge and Beckett as his assailants, although in court, he denied knowing who hit him.

Longtime neighbor, Angelisa Love (Love), testified that though she did not see the entire confrontation, she did see both defendants assault Jenkins. Hodge hit Jenkins first, followed by Beckett, with both blows landing on the left side of Jenkins's face in very

rapid succession. Jenkins appeared to be dazed and he stumbled backward and hit the pavement. When Love yelled, "Oh, no. Oh, no," defendants ran off.

Los Angeles Police Officer Bradley Nielson (Officer Nielson) testified as the investigating officer and the gang expert. Since April 2007, he had been assigned to investigate the 55 and 57 Neighborhood Crips gangs. Officer Nielson explained that the 55 Neighborhood Crips was a criminal street gang with approximately 90 members. Its gang sign was made by forming the fingers into an "N" and an "H."

Officer Nielson had personally investigated gang related crimes, and had arrested members of the 55 Neighborhood Crips for crimes relating to the gang's primary activities, which consisted of shootings, narcotics trafficking, street robberies, and witness intimidation. Officer Neilson had made approximately 72 gang arrests before this crime, but not of defendants. He submitted certified records of convictions of two people he knew to be members of the 55 Neighborhood Crips gang. One was convicted of murder; the other was convicted of assault with a firearm.

Officer Nielson testified that Hodge had personally admitted his membership in the 55 Neighborhood Crips gang, most recently on the day of his arrest, and on many occasions in the two months prior to his arrest. Hodge's gang moniker was "Baby Snaps."

Officer Nielson was also acquainted with Beckett, who was an active 55 Neighborhood Crips gang member. Beckett used the moniker, "Infant Snaps."

Beckett had gang tattoos on his arms, chest or shoulders, triceps, and calves. Hodge had gang tattoos on his arms. Officer Neilson explained that tattoos were some evidence that a person was active in a gang.

On June 2, 2008, at approximately 5:30 p.m., while Officer Nielson was patrolling the 55 Neighborhood Crips territory with his partner, they received a radio call to respond to the scene of the assault. They found Jenkins on the ground next to a blue pickup truck, with a large amount of blood on the front and side of his face, and pooling under him. Jenkins was incoherent, dazed, very confused, and disoriented; he did not respond to questions in any meaningful way.

Investigation turned up the names "Snaps" and "Omar" as suspects. When the officers interviewed Jenkins about an hour later at the hospital, and showed him photographs of Beckett and Hodge, Jenkins identified them as his assailants.

Eight days later, Beckett was arrested in the company of another 55 Neighborhood Crip gang member, Damon Conway. When Hodge was arrested a few days after that, he was also with a 55 Neighborhood Crips member.

Officer Nielson was of the opinion that the assault on Jenkins was gang related. He cited evidence of disrespect for the gang, or perceived disrespect, in Jenkins's erasing the gang writing on the truck window. He explained that gang culture relied heavily on respect, and any form of disrespect, actual or perceived, would generally be dealt with very quickly and harshly in order to send a message to the community. This promotes fear and intimidation in the neighborhood, so that people are less likely to report gang crimes.

Officer Neilson was of the opinion that the crime was committed for the benefit of or in association with the 55 Neighborhood Crips gang, for the additional reason that there were two gang members and both were involved in the assault. Gang members commonly commit assaults or other crimes as a group or team, acting in concert from a sense of responsibility.

In response to a hypothetical question based on the facts of this case, Officer Nielson expressed the opinion that such a crime would be gang related. He opined that any disrespect, whether actual or perceived, especially around other gang members or other citizens, would require a response. Otherwise, both the disrespected gang member, the gang, and all its members would look bad, weakening the gang's enforcement capabilities inside and outside its neighborhood.

Neither defendant had been wearing gang clothing, nor did they "claim" their gang, as part of the assault on Jenkins. The absence of gang symbols in this case did not change Officer Nielson's opinion that this was a gang related incident as defendants were in their gang's territory and did not have to identify themselves as members of the 55 Neighborhood Crips to make themselves known.

No defense evidence was presented.

3. Motion for Mistrial

On cross-examination, Hodge's counsel asked Officer Nielson about his testimony regarding witness intimidation: "[Y]ou said that the witnesses may not want to testify because of intimidation, but there has been no . . . intimidation; is that correct?" Officer Nielson replied: "I was approached by the detective, and he expressed to me concerns about there was some witness intimidation in by Mr. Hodge."

Outside the jury's presence, Beckett's counsel objected to the gang intimidation testimony, and moved for a mistrial, joined by Hodge's counsel. The court struck the testimony, but denied the motion, and informed counsel that the jury would be told to disregard it. Once the jury reconvened, the court informed the jury that it had stricken "any evidence in the form of testimony from Officer Nielson . . . regarding the intimidation of witnesses." The court told that jury: "It is not in evidence in this case, and there is no evidence of any witness intimidation in this case. I would ask for your assurance that you will follow my directives in this case. Will you all do that?" The jurors responded in the affirmative, and the court noted that everybody was saying yes.

4. Verdict, Postverdict Proceedings, and Sentencing

Hodge waived trial on his prior strike, and admitted that he sustained a prior juvenile robbery conviction. He then brought a *Romero* motion to dismiss the prior strike.[2] After expressing grave concern about the nature of the current crime, the court noted that Hodge had been committed to the California Youth Authority in December 1998, and after his release he violated parole twice before his discharge in 2006. Because of that history, and the violent nature of the offense, the court denied the motion.

Defendants brought a motion for new trial on the grounds of the insufficiency of the gang evidence and prosecutorial misconduct in arguing to the jury that Jenkins may have minimized the severity of the attack because he was afraid, in that he still lived in

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[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529-530 (*Romero*).

Neighborhood Crips territory. The court found sufficient evidence and no prejudicial misconduct, and thus denied the motion.

Both defendants were sentenced to state prison and each filed a timely notice of appeal.

DISCUSSION

I. Sufficient Evidence to Support the Gang Finding

Both defendants contend that the jury's true finding on the gang allegation must be reversed as unsupported by substantial evidence.

A gang enhancement finding is reviewed under the same substantial evidence standard as any other conviction. (*People v. Ochoa* (2009) 179 Cal.App.4th 650, 657 (*Ochoa*).) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.) We must presume in support of the judgment the existence of every fact the jury could reasonably deduce from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*Ibid.*) We do not reweigh the evidence or resolve conflicts in the evidence. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Defendants argue that Officer Nielson gave an improper opinion that was not supported by evidence. The prosecution may present expert testimony on the culture and habits of criminal street gangs. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617-620.) Further, expert testimony may include "the size, composition, or existence of a gang [citations], gang turf or territory [citations], an individual defendant's membership in, or association with, a gang [citations], the primary activities of a specific gang [citations], motivation for a particular crime, generally retaliation or intimidation [citations], whether and how a crime was committed to benefit or promote a gang [citations], rivalries between gangs [citations], gang-related tattoos, gang graffiti and hand signs [citations],

and gang colors or attire [citations]." (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 657, fns. omitted.)

The expert may also render an opinion as to whether a crime is committed for the benefit of, at the direction of, or in association with a criminal street gang, based on the facts of a hypothetical question, so long as the hypothetical is "rooted in facts shown by the evidence." (*People v. Gardeley*, *supra*, 14 Cal.4th at p. 618.) A finding that an offense was gang related may not be based solely upon a gang expert's testimony. (*Ochoa*, *supra*, 179 Cal.App.4th at p. 657.) "[S]ome substantive factual evidentiary basis, not speculation, must support an expert witness's opinion." (*Id*. at p. 661, fn. omitted.)

The gang enhancement of section 186.22, subdivision (b)(1), has two prongs, both of which the prosecution must prove: (1) the crime was committed for the benefit of, at the direction of, or in association with any criminal street gang; and (2) the crime was committed with the specific intent to promote, further, or assist in any criminal conduct by gang members. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 322.) We find the evidence sufficient to support the expert's opinion and establish both prongs.

The commission of a crime of the kind commonly committed by the defendants' gang, in concert with one or more members of that gang, provides evidence of both prongs. (*People v. Morales* (2003) 112 Cal.App.4th 1176, 1198.) Independent evidence supported Officer Neilson's opinion that defendants were both members of the 55 Neighborhood Crips, a criminal street gang. Officer Neilson, who had investigated the gang for a year, noted that its members committed shootings, narcotic trafficking, street robberies and witness intimidation. He testified that two members of 55 Neighborhood Crips had been convicted of assaultive crimes: murder and assault with a firearm.

Officer Nielson had investigated and arrested many of the members of the 55 Neighborhood Crips, and was personally acquainted with the defendants, whom he knew to be active members of the gang. Hodge had admitted his membership numerous times in addition to having gang tattoos which Officer Nielson testified demonstrated active

membership in a gang. Beckett had a tattoo "55" and other tattoos relating to the Neighborhood Crips.

It was Officer Neilson's opinion that the defendants committed the crime in association with the gang. This opinion was supported by evidence that the crime involved both defendants and gang graffiti. A jury may reasonably infer the association element from the very fact that defendants committed the charged crime with another gang member, unless there is evidence that the gang members are "on a frolic and detour unrelated to the gang." (*People v. Morales, supra,* 112 Cal.App.4th at p. 1198.) Here there was no indication of a detour from gang purpose.

Jenkins heard Beckett suggest that Hodge had written gang related symbols on the truck window, and Jenkins himself saw "50" or "55." Jenkins then erased the writing. Officer Neilson testified that in gang culture, erasing that kind of writing would be perceived as a sign of disrespect. Defendants' response was quick, harsh, and delivered as a team or with a gang purpose.

The same evidence showed the second prong of the gang enhancement -- that defendants harbored the specific intent to assist each other in the commission of the crime. "Commission of a crime in concert with known gang members is substantial evidence which supports the inference that the defendant acted with the specific intent to promote, further or assist gang members in the commission of the crime. [Citation.]" (*People v. Villalobos, supra,* 145 Cal.App.4th at p. 322.)[3]

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[3] Citing federal appellate decisions, Beckett contends that to prove the specific intent element of section 186.22, subdivision (b)(1), the People were required to show more than the commission of the current crime with another gang member; they were required to prove a specific intent to promote, further, or assist in *other* criminal conduct by the defendant's gang. (See *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1080; *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1103-1104.) A similar contention has been rejected by several California appellate courts. (See, e.g., *People v. Vazquez* (2009) 178 Cal.App.4th 347, 353-355; *People v. Hill* (2006) 142 Cal.App.4th 770, 773-774; *People v. Romero* (2006) 140 Cal.App.4th 15, 19.) We agree with the California courts, and as we are not bound by decisions of the lower federal courts (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3), we decline to follow the cited Ninth Circuit cases.

Defendants argue that this is insignificant because they acted in self-defense. They point to evidence that Jenkins was a large man, much larger than Hodge, and to his testimony that he was in a "hot rage," when he aggressively approached the two defendants, shouting profanities and ready to fight. The jury heard this evidence and was instructed regarding self-defense, including the right to use force and not to retreat. The jury was also instructed to resolve any conflicts in the evidence. The jury rejected self-defense after hearing Love testify differently.

Defendants cite several cases in which expert opinions were held not to have a sufficient evidentiary basis, and contend that the facts of this case are even less substantial. (See *Ochoa*, *supra*, 179 Cal.App.4th 650; *People v. Ramon* (2009) 175 Cal.App.4th 843 (*Ramon*); *In re Frank S.* (2006) 141 Cal.App.4th 1192; *People v. Killebrew*, *supra*, 103 Cal.App.4th 644.) We disagree and find them inapposite. Indeed, in all but one of the cited cases, *Ramon*, the crimes were committed by a lone gang member. In *Ramon*, two gang members were stopped in a stolen truck in their gang's territory, and an unregistered firearm was recovered from under the driver's seat. (*Ramon*, *supra*, at pp. 846-847.) The appellate court reversed the gang enhancement, holding that the facts were insufficient to show that the two harbored the specific intent to promote, further, or assist criminal conduct by gang members. (*Id*. at pp. 851-852.) The court noted, however, that its "analysis might be different if the expert's opinion had included 'possessing stolen vehicles' as one of the activities of the gang." (*Id*. at p. 853.) Here, assault crimes are the type of crimes committed by the 55 Neighborhood Crips gang, a circumstance which supports the jury's finding of specific intent.

We conclude that the true gang finding was supported by substantial evidence.

II. There Was No Prosecutorial Misconduct

Beckett contends that the prosecutor engaged in misconduct during his closing argument, and Hodge joins in the contention.

Beckett objected to the following argument: "[Jenkins] was honest, forthright. He told you everything. He told you everything. But it is almost like he told you too much, like he was trying to minimize the defendants' conduct. He was trying to put it all on

himself. Well, why would he do that? Why will a guy that got knocked unconscious, lying in a pool of blood on the street, why would he tell you, the jury in this case, 'Well, what they did wasn't that bad.' [Officer Nielson] told you why. Because [Jenkins] still lives in that neighborhood. He is afraid. There are [90] members of the Neighborhood Crips."

Beckett stated no ground for his objection, but in overruling it, the court told the jurors to make up their own minds as to what the evidence showed, using common sense and the evidence. The prosecutor then said: "These two guys in court here today are not the only members of the 55 Neighborhood Crips, are they? So the only evidence is what [Jenkins] told you. There is a problem with that because he has always maintained he made no physical attack on these guys ever. He went down there. He was angry. He said -- I think he was over-exaggerating because he is trying to minimize, but he went down there. He was upset."

Later, the prosecutor asked the jury to infer from the nature of Jenkins's injuries that defendants delivered more than two blows. He then argued: "Now, why would [Love] say there were only two hits? She lives in the neighborhood. She is afraid. She has to deal with all the other 55 Neighborhood Crip members on a daily basis along with her son."

Beckett contends the prosecutor argued facts that were not in evidence, because the court had stricken Officer Nielson's testimony regarding witness intimidation. We disagree. The court told the jury that there was no evidence of witness intimidation, but struck only the following testimony relating to witness intimidation in this case: "I was approached by the detective, and he expressed to me concerns about there was some witness intimidation in by Mr. Hodge." However, Officer Nielson also testified that the 55 Neighborhood Crips gang was a criminal gang whose primary activities included shootings and witness intimidation, and that he had personally investigated and arrested members for those crimes. One member had been convicted of murder, and another of assault with a firearm.

As Beckett acknowledges, Officer Nielson agreed that it was common for witnesses to become less cooperative with the police and prosecution as the prosecution advanced. He added: "It basically goes back to the individual's actual safety or perceived safety of themselves, their property, and their family. If most of the time the crimes are committed in the neighborhood that the gang operates in, if you see gang members outside your house on a day-to-day basis and you report whatever criminal activity that they are up to, eventually they are going to find out who is reporting the crime, when the police are interviewing you, when you are showing up to court. That is very detrimental to the gang's effectiveness in being able to operate."

Beckett contends that even if the prosecutor was referring to testimony that was not stricken, it was at least mischaracterized by suggesting that witnesses testified weakly in this case due to fear of retaliation. Respondent points out that defendants did not object to the argument on this ground, or ask for an admonishment, and argues that defendants thus did not preserve the issue for appeal. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001.) Beckett counters that if the issue was not preserved, trial counsel provided ineffective assistance.

Since the prosecutor's argument was not improper, and any objection or request for admonishment would have been unmeritorious, counsel was not ineffective. (See *People v. Price* (1991) 1 Cal.4th 324, 387.) The inferences argued by the prosecutor were properly drawn from the evidence. Love's testimony was that she did not see Jenkins make an aggressive move or take a fighting stance, and he did not seem angry. Jenkins's own testimony, that he had turned away when he was approximately six feet from Hodge, was at odds with his view that Hodge might have acted in self-defense. So, too, were Jenkins's injuries: six stitches on the face, 10 stitches in the mouth, and a road-burn type of abrasion on the back so severe that it left a scar.

Jenkins and Love had grown up in the neighborhood. At the time of trial, Jenkins still frequented the area, and Love lived there with her son and other family members. The 55 Neighborhood Crips had claimed the neighborhood as its territory, and Jenkins had assumed that defendants were gang members when they beat him. It was reasonable

to infer that at trial, Jenkins was attempting to minimize the incident due to fear of the same gang that engaged in witness intimidation, assault, and murder.

"'[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the conclusions are illogical because these are matters for the jury to determine.' [Citations.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 526.)

The evidence showed that the 55 Neighborhood Crips gang was a frightening presence in its territory and that because of this, witnesses from the neighborhood were fearful. A witness's fear of testifying and the basis for that fear is relevant to his or her credibility. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946.) It also helps to explain the conflicts and inconsistencies in the witness's testimony. (*Ibid*.) We conclude that the inferences suggested by the prosecutor were reasonable and a proper subject of argument.[4]

III. CALCRIM No. 3160 is a Correct Statement of Law

Defendants contend that the trial court should have added language to CALCRIM No. 3160, an instruction regarding the application of the section 12022.7 sentence enhancement for personally inflicting great bodily injury in the course of a group beating.[5]

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[4] As we have found no prosecutorial misconduct, we need not reach Beckett's prejudice argument. We observe, however, that Beckett's argument would not be persuasive, as it is premised upon the prejudicial nature of evidence that the witness was intimidated by the defendant or a third party, whereas here, the prosecutor did not argue, suggest, or imply that anyone attempted to intimidate the witnesses.

[5] In relevant part, CALCRIM No. 3160 reads: "If you conclude that more than one person assaulted [name of victim] and you cannot decide which person caused which injury, you may conclude that the defendant personally inflicted great bodily injury on [the victim] if the People have proved that: [¶] 1. Two or more people, acting at the same time, assaulted [the victim] and inflicted great bodily injury on (him/her); [¶] 2. The defendant personally used physical force on [the victim] during the group assault; [¶] AND [¶] 3A. The amount or type of physical force the defendant used on [the victim]

Defendants also contend that CALCRIM No. 3160 is an incorrect statement of law, because it does not contain language included in CALJIC No. 17.20, which was the group assault instruction approved by the California Supreme Court in *People v. Modiri* (2006) 39 Cal.4th 481 (*Modiri*). They quote CALJIC No. 17.20, and Beckett has placed the desired language in boldface, as follows: "When a person participates in a group beating and it is not possible to determine which assailant inflicted a particular injury, he or she may be found to have personally inflicted great bodily injury upon the victim if [1)] the application of unlawful physical force upon the victim was of such a nature that, by itself, it could have caused the great bodily injury suffered by the victim [.] [; or 2) that at the time the defendant personally applied unlawful physical force to the victim, the defendant knew that other persons, as part of the same incident, had applied, were applying, or would apply unlawful physical force upon the victim and **the defendant then knew, or reasonably should have known, that the cumulative effect of all the unlawful physical force would result in great bodily injury to the victim.]]**"

Defendants construe *Modiri* as requiring the emphasized language whenever the jury is asked in a group beating case to make a finding that a defendant personally inflicted great bodily injury on the victim.[6] As respondent points out, the court never considered in *Modiri* whether the knowledge language of the instruction was required, or whether it would be error to exclude it. The defendant in that case had complained of its

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was enough that it alone could have caused [the victim] to suffer great bodily injury; [¶] OR [¶] 3B. The physical force that the defendant used on [the victim] was sufficient in combination with the force used by the others to cause [the victim] to suffer great bodily injury. [¶] The defendant must have applied substantial force to [the victim]. If that force could not have caused or contributed to the great bodily injury, then it was not substantial."

6 Although the statute at issue in *Modiri* was section 1192.7, subdivision (c)(8), which defines serious felony for purposes of the Three Strikes law, the required findings are identical, and CALJIC No. 17.20 applies equally to both. (See *Modiri*, *supra*, 39 Cal.4th at p. 499.)

inclusion not of its exclusion, asserting that it allowed the jury to find him vicariously liable for force applied to the victim by others. (*Modiri*, *supra*, 39 Cal.4th at p. 501.)

We agree with respondent that *Modiri* merely held that the knowledge language of CALJIC No. 17.20 did not dispense with the requirement that the defendant personally apply physical force, and that such force was sufficient to produce great bodily injury, either by itself or in combination with the force produced by other assailants. (*Modiri*, *supra*, 39 Cal.4th at p. 501.) Nor did CALCRIM No. 3160 dispense with the requirements that *Modiri* held necessary. As given here, the instruction told the jury that to find the enhancement allegation true, it was first required to find that the defendant personally used physical force on the victim, and that such force caused great bodily injury. It instructed that the amount of force used by the particular defendant must have been enough, by itself, to have caused the great bodily injury; or that it was sufficient in combination with the force used by other assailants to have caused the great bodily injury. Thus, under the reasoning of the Supreme Court in *Modiri*, CALCRIM No. 3160 correctly instructs the jury regarding the findings that are prerequisite to the imposition of the sentencing enhancement under section 12022.7, subdivision (a). (See *Modiri*, *supra*, 39 Cal.4th at pp. 494, 496, 501.) We conclude that the trial court did not err in giving CALCRIM No. 3160.[7]

IV. No Abuse of Discretion in Denying *Romero* Motion

Hodge asked the court to dismiss the allegation of his prior felony conviction, and sentence him as a first offender, rather than a second striker under the Three Strikes law.

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[7] Because we find that the court correctly instructed the jury, we need not reach defendants' prejudice arguments. However, we agree with respondent that under the circumstances of this case, no reasonable jury would have found that defendants could not reasonably have known that more than one closed-fisted blow to the head could have the cumulative effect of causing great bodily injury. Indeed, even a single blow to the face may be sufficient force to cause great bodily injury. (*In re Nirran W.* (1989) 207 Cal.App.3d 1157, 1161; see also *People v. White* (1961) 195 Cal.App.2d 389, 391-392 [assailant delivers one punch to victim's eye].) Here, Love was certain that both defendants punched Jenkins in the face, and his injuries were consistent with more than one severe blow.

He contends that the court abused its discretion in denying his motion, brought under section 1385, subdivision (a), and *Romero, supra,* 13 Cal.4th 497.

The trial court's discretion to strike an allegation of a prior felony conviction in furtherance of justice is limited. (*Romero, supra,* 13 Cal.4th at p. 530.) The court must consider the nature and circumstances of the defendant's present felony and prior serious or violent felony convictions, as well as his background, character, and prospects, to determine whether he may be deemed outside the spirit of the Three Strikes law, in whole or in part. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) We review the trial court's decision under the deferential abuse of discretion standard. (*Id.* at p. 162; *Romero, supra,* at p. 530.)

It is Hodge's burden on appeal to demonstrate that the trial court's decision was irrational, arbitrary, or not "'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977.) The trial court's "discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Hodge's prior strike was a juvenile adjudication involving robbery, a serious and violent felony. In that case Hodge was almost 17 years old when a juvenile petition was filed in July 1998, after a victim reported that Hodge and a companion had robbed him at gunpoint at a beauty salon, taking his wallet and ordering him to take property from other people in the salon at that time. The victim reported that Hodge was holding the gun. The petition alleged three counts of robbery, one count of assault with a firearm, and two counts of attempted robbery.

The juvenile petition was sustained on the basis of two counts of robbery, and Hodge was committed to the CYA for a period not to exceed 15 years. After Hodge was released, he violated his parole several times before his discharge in September 2006.

The trial court duly considered on the record the factors suggested by *People v. Williams, supra,* 17 Cal.4th at page 161: the nature and circumstances of the present

felony and prior serious or violent felony convictions, and Hodge's background, character, and prospects. The court expressed grave concern about the nature of the current crime: "The brazen act of violence against the alleged victim is significant, serious and violent." The court found that the prior offense was not remote, having been committed within 10 years of the current offense, and noted that after his release from the CYA, appellant violated parole twice before his discharge in 2006. The court concluded: "Mr. Hodge is an individual who falls squarely within the purview of the Three Strikes law in this case. He has not learned from his past error. He violated the parole after he was released, and he has engaged in yet another violent felony with the attendant consequences."

Hodge contends that the court's denial of his motion was irrational and arbitrary. He points to defense counsel's argument to the trial court that 11 years had elapsed between crimes, that he was 16 at the time of the juvenile offense, that his parole violations were for failure to report, and that police "F.I." cards from the 1990's showed only three contacts with the police. Counsel argued that the absence of recent police contacts showed that he was not active in the gang.

On the contrary, the record reflects that the trial court heard and considered counsel's argument. The court asked questions of counsel, rejected her erroneous representation that there had been an 11-year period between Hodge's crimes, and acknowledged that Hodge had committed the prior offense as a juvenile. Further, although the court did not expressly address counsel's argument that Hodge may not have been an active member of the gang for a period of years, we observe that counsel's argument was not persuasive. The jury in this case found beyond a reasonable doubt that Hodge engaged in gang activity.

Hodge contends that the trial court failed to consider Jenkins's "acknowledgment" that he was the aggressor. He points to Jenkins's testimony that he might have "come out a little bit too strong," and Jenkins's opinion that Hodge might have acted in self-defense. Hodge also points to Jenkins's statement to the probation officer that he did not want to see the defendants sentenced to prison, and argues that this demonstrated a consciousness

of his own responsibility in the incident and an acknowledgment that he was the aggressor. Hodge argues that he believed that Jenkins might attack him, albeit unreasonably so, and thus cannot be deemed to fall within the spirit of the Three Strikes law. (See *People v. Williams*, *supra*, 17 Cal.4th at p. 161.)

In light of the jury's disbelief that Jenkins was the aggressor, we cannot find that the court was arbitrary or irrational to give little credence to that argument. We also observe that, contrary to Hodge's argument, there was no evidence of his belief that Jenkins might attack him. Jenkins testified that he saw anger on Hodge's face; he did not testify that he saw fear.

At most, Hodge has presented facts which "merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. [Citation.] . . . In other words, discretion is abused only if the court exceeds the bounds of reason, all of the circumstances being considered. [Citation.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) We find no abuse of discretion.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD